Dangers in the System that Purports to Protect:
The Situation of Sex Workers and Migrant Domestic Workers in Hong Kong*

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I. Introduction

In theory, domestic workers and sex workers are at greater risk of gender-based violence because they work in private places, away from the public eye. That narrative implicitly assumes that the legal system would protect sex workers and domestic workers from acts of violence if they were less "hidden" from public view. This paper challenges that assumption in the context of Hong Kong, a former British colony that is now a Special Administrative Region of China. I argue that the state upholds laws and policies that make sex workers and migrant domestic workers highly vulnerable to violence, both physical and structural. This connection between violence and state action is not hidden but rather has been documented and widely discussed in public forums, not only in Hong Kong but also at the international level. Nonetheless, the Hong Kong government continues to resist fairly simple reforms that might empower these women and enable them to better protect themselves. The question presented by this research project is whether sex workers and migrant domestic workers are deliberately being "left out" of Hong Kong's human rights framework and, if so, why? It is tempting to conclude that they have been excluded from law reform simply because they represent the "other" – sex workers are widely disapproved of in Hong Kong and migrant domestic workers are predominantly Filipino and Indonesian, thus ethnically different from the Hong Kong Chinese majority. However, I argue that these women are further marginalized by their awkward position within two very contentious debates in Hong Kong – one on the question of whether the sex industry should be further decriminalized and one on the question of migrant labor. Although the political compromises that have been forged are apparently "acceptable" (and perhaps even desirable) to the majority of Hong Kong people, they expose the workers to unnecessary dangers and hardship.

Hong Kong provides an interesting case study, partly because of its multicultural and international influences. It is a predominantly Chinese territory but inherited a common law legal system from the United Kingdom, including an independent judiciary and a commitment to procedural justice. The women's movement achieved significant law reform during the transition period leading to the resumption of Chinese sovereignty

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(1984-1997), a period of increased democracy and concern for human rights. [1] Law reform and jurisprudence in Hong Kong has also been strongly influenced by international human rights treaties.[2] Although Hong Kong is now a part of China, the local government still prepares a separate report for each United Nations human rights treaty that applies to Hong Kong and the relevant UN committees issue Concluding Observations that are specific to Hong Kong. Local leaders are anxious to demonstrate that human rights are still protected in Hong Kong and often undertake reforms to comply with these Concluding Observations.

Part II of the paper briefly reviews Hong Kong's general approach to human rights, gender equality, and violence against women. It demonstrates that the Hong Kong government does consider violence against women to be an issue worthy of attention and believes that law has a role to play in preventing and remedying gender-based violence. Part III of the paper then presents the research results concerning sex workers in Hong Kong and the reasons why the current legal framework makes them particularly vulnerable to violence. Part IV analyzes the situation of migrant domestic workers, who are legally required to live with their employers and severely penalized if they resign or are fired before the end of their two-year contract. The paper concludes, in Part V, by considering why the government has been so reluctant to adopt law reform that might make these two groups of women safer in their working lives.

II. Preventing Gender Discrimination and Gender-based Violence in Hong Kong

Given its level of economic development, Hong Kong entered the field of anti-discrimination law rather late. This was partly due to its colonial history, which was inherently undemocratic and institutionalised inequality.[3] Although the United Kingdom enacted its first law prohibiting sex discrimination in 1967, the Hong Kong colonial government initially had little interest in following that example. Colonial officials argued that a law prohibiting gender discrimination would burden the influential business community and might also conflict with traditional Chinese cultural practices. In fact the Hong Kong government itself maintained a number of laws and policies that discriminated against women, including a prohibition on female inheritance of land.[4]

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[1] *See* generally Eliza Lee, ed, GENDER AND CHANGE IN HONG KONG: GLOBALIZATION, POSTCOLONIALISM, AND CHINESE PATRIARCHY (University of British Columbia Press, 2003).

[2] Carole J. Petersen, *Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence,* in Fu Hualing, Lison Harris, and Simon N. M. Young, eds, INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE (Palgrave Macmillan, 2007).

[3] Harriet Samuels, *Women and the Law in Hong Kong: A Feminist Analysis*, in Raymond Wacks, ed., HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY (HKU Press 1993).

[4] Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong* (1996) 34 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 335. The prohibition on female inheritance was finally repealed in 1994.

The transition period leading to Hong Kong's return to China (1984-1997) gave women and human rights organizations the perfect opportunity to lobby for law reform. The Sino-British Joint Declaration of 1984 (the treaty by which the British government agreed to return Hong Kong to China in 1997) provided for the continued application of international human rights treaties to Hong Kong, including the International Covenant on Civil and Political Rights (ICCPR). In 1989, in an effort to boost public confidence after the June 4th crackdown in Beijing, the colonial government proposed a Hong Kong Bill of Rights. Enacted in 1991, the Bill of Rights Ordinance was essentially copied from the ICCPR, which contains three articles prohibiting discrimination. Although the Bill of Rights itself was confined to the public sector, the women's movement used the legislative debate on it to raise awareness of gender discrimination in general. This was significant because limited democracy was also being introduced, in preparation for the end of colonial rule and the Legislative Council was becoming more accountable to the public. In December 1992, legislator Emily Lau successfully introduced a motion calling for the extension of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to Hong Kong. The government initially resisted but agreed to initiate the first public consultation on sex discrimination and the results were overwhelmingly in favour of accepting CEDAW and adopting domestic sex discrimination legislation. Later that year, legislator Anna Wu introduced the Equal Opportunities Bill, which sought to prohibit discrimination on a wide range of grounds (including sex, marital status, pregnancy, disability, sexuality, race, and age). Under pressure, the government abandoned its longstanding opposition to anti-discrimination legislation and introduced two narrower compromise bills, the Sex Discrimination Bill and the Disability Discrimination Bill. The two laws were enacted in the summer of 1995 and brought into force in late 1996.[5]

The Sex Discrimination Ordinance (SDO) is largely based upon the British Sex Discrimination Act 1975, although certain provisions were borrowed from Australian federal law and Anna Wu's Equal Opportunities Bill (which was based upon Western Australian law).[6] The SDO prohibits both sex discrimination and sexual harassment and there is no need for the plaintiff to prove that the harassment was discriminatory.[7] The legislature also created the Hong Kong Equal Opportunities Commission (EOC), which is an independent body but funded by the government. Although the EOC's primary enforcement mechanism is the power to investigate and conciliate complaints, it has also litigated some important cases.[8] In one high-profile action for judicial review, the Court of First Instance used CEDAW as a guide to interpreting the SDO and then held that the

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[5]This section is summarized from Petersen, n. 4 above.

[6]For further discussion of the substantive provisions of Hong Kong's anti-discrimination laws, *see* Carole J. Petersen, *Equal Opportunities: a New Field of Law for Hong Kong*, in Raymond Wacks, ed., THE NEW LEGAL ORDER IN HONG KONG (HKU Press, 1999).

[7]Carole J. Petersen, *Negotiating Respect: Sexual Harassment and the Law in Hong Kong*, 7 INTERNATIONAL JOURNAL OF DISCRIMINATION AND THE LAW 127-168 (2005).

[8]Carole J. Petersen, *Stuck on Formalities? A Critique of Hong Kong's Legal Framework for Gender Equality,* in Fanny M. Cheung and Eleanor Holroyd, eds, MAINSTREAMING GENDER IN HONG KONG SOCIETY (Chinese University Press, 2009).

government's system of allocating students to prestigious secondary schools unlawfully discriminated against girls.[9]

As an appointed government, the Hong Kong government is continually battling to demonstrate its legitimacy to the people and to the international community. One way that it seeks to do so is by participating actively in the reporting process for the UN human rights treaties that apply to Hong Kong and responding to at least some recommendations of treaty bodies, so as to obtain a reasonably positive human rights "report card" at every review. While the most influential treaty is unquestionably the ICCPR (because it has been largely incorporated into domestic law), other treaties have also had an impact on law and policy. For example, the Hong Kong government changed its screening mechanisms for potential victims of torture to comply with its obligation, under the Convention Against Torture (CAT), not to deport a person back to a country where she would be at risk of being tortured.[10] The government also finally introduced a bill (albeit a weak bill) to prohibit race discrimination, at least in part because of repeated urging by the Committee on the Elimination of Race Discrimination.[11]

There is little doubt that this approach to international treaties has benefited Hong Kong residents generally, allowing them to maintain a higher degree of civil liberties than residents of Mainland China.[12] Hong Kong laws prohibiting gender discrimination and gender-based violence are also stronger and more enforceable than comparable legislation in Mainland China. Women activists in Hong Kong enjoy freedom of speech, association, and assembly and therefore active in policy debates. Women's organizations frequently make submissions to the executive branch and to the Legislative Council. They also regularly submit "alternative reports" (also referred to as "shadow reports") to

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[9]For discussion of the case and the general impact of CEDAW in Hong Kong, *see* Carole J. Petersen and Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 1-50 (2002).

[10]Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Hong Kong to the Committee Against Torture (CAT/C/HKG/4), Sept. 26, 2008, paras 39-45.

[11]For the history of the CERD Committee's input, *see* Kelley Loper, *One Step Forward, Two Steps Back? The Dilemma of Hong Kong's Draft Race Discrimination Legislation*, 38 HONG KONG LAW JOURNAL 15 (2008); and Carole J. Petersen, *Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong*, 34 HONG KONG LAW JOURNAL 459 (2004).

[12]Compare the chapter on Hong Kong with the chapter on China in Randall Peerenboom, Carole J. Petersen, and Albert H. Y. Chen, eds., HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE UNITED STATES (Routledge 2006).

the UN human rights treaty-monitoring bodies, to ensure that the government report does not gloss over human rights violations. Although they lack the power to vote out the executive branch, local women's organizations recognize that the government cares about the Concluding Observations of the international treaty-monitoring bodies and they use the reporting process as a mechanism for applying pressure.

The influence of the treaties and the government's desire to please treaty-monitoring bodies is apparent in some of Hong Kong's law reform related to gender-based violence. For example, in 2001 the government introduced legislation to expressly prohibit marital rape, in direct response to the CEDAW Committee's comment in 1999 that the law was not sufficiently clear on this point.[13] The Committee on Economic, Social and Cultural Rights welcomed this development in its review of Hong Kong in 2005.[14] More recently, Hong Kong expanded the scope of the Domestic Violence Ordinance (originally enacted in 1996) so as to cover violent acts within a broader range of intimate and family relationships and to empower the court to require abusers to attend an anti-violence behavior program.[15] When the Committee Against Torture reviewed Hong Kong in late 2008, the government described this legislation (enacted in June 2008) and several new programs designed to prevent domestic violence, including training packages for frontline police officers and alternative housing for victims. This year the Hong Kong Women's Commission (which was established in part because of recommendations of the CEDAW Committee) has also launched a large program to reduce the incidence of domestic violence. The government also introduced, in 2009, an additional bill to further expand the coverage of the Domestic Violence Ordinance, this time to include same-sex relationships.[16]

This is a fairly condensed summary of the relevant law reform in Hong Kong but should demonstrate two points: (1) the Hong Kong government and Legislative Council are willing to adopt legal and policy reforms to address violence against women (particularly domestic violence); and (2) the unelected government pays attention to recommendations of international human rights bodies when considering what reforms to adopt. However, as demonstrated in the next two sections, the response has been rather different when it comes to violence experienced by sex workers and migrant domestic workers. This is not because the violence has not been exposed or publicly debated. It has been discussed in many public

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[13]Petersen, n. 4 above.

[14]Concluding observations of the Committee on Economic, Social and Cultural Rights on the People's Republic of China (including Hong Kong and Macao), May 13, 2005, para 75.

[15]The legislation and records of the discussion leading to its enactment in 2008 are available on the website of the Legislative Council's Bills Committee to Study the Domestic Violence (Amendment) Bill 2007, at http://www.legco.gov.hk/yr06-07/english/bc/bc61/general/bc61.htm (visited Oct. 20, 2009).

[16]The legislation and relevant papers are available on the website of the Legislative Council's Bills Committee to Study the Domestic Violence (Amendment) Bill 2009, at http://www.legco.gov.hk/english/index.htm (visited Oct. 20, 2009).

forums, including reviews by international treaty bodies. However, Hong Kong appears less interested in reforms that might make these women safer in their working lives.

I. Sex Workers: Dangers of the One-Woman Brothel System

Sex work presents difficult issues for feminist theory.[17] Some feminists argue for complete abolition on the ground that sex work is inherently violent and exploitative. The model adopted by Sweden (which prohibits the buying rather than the selling of sex) is often proposed as a means of abolishing the sex industry without punishing sex workers.[18] In Hong Kong, sex worker organizations take a labor-rights perspective and argue that sex work should be legalized, enabling women to form labor unions, enforce contracts, and hire security guards to protect them from dangerous clients. The Hong Kong government does not seem to know which approach it prefers. The legal system has settled on an awkward compromise between abolitionist and labor-rights positions, one that arguably heightens the risk of violence in an already a dangerous profession. In essence, sex work is not prohibited in Hong Kong if a local woman practices in a "one-woman brothel" and is careful not to advertise or solicit clients. Although Hong Kong is not really a destination for "sex tourism" (because it is a fairly expensive place to visit relative to other South East Asian counties), the domestic demand for commercial sex is fairly strong. One survey reported that one in seven Hong Kong men made at least one visit to a sex worker in a six-month period.[19]

My research into sex workers in Hong Kong initially focused on migrant sex workers because it was part of a group research project on trafficking of women into Hong Kong. In essence, we obtained permission to interview a sample of Mainland Chinese women who had been incarcerated in Hong Kong prisons for offenses related to alleged sex work. Before 1997, Mainland Chinese women were fairly rare in Hong Kong's sex industry. However, according to immigration authorities, they now represent more than 90% of the women arrested for suspected involvement in sex work. Although the immigration border is still tightly regulated, it has become much easier in recent years for Mainland Chinese to obtain a visa to enter Hong Kong, either for tourism or to visit relatives. But women from Mainland China cannot legally work in Hong Kong without a work visa, which they cannot obtain for sex work.

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[17]For a small sample of the rich literature on this topic, *see* the essays written by Judith R. Walkawitz, Lars O. Ericsson, Carole Pateman, Catharine MacKinnon, Jody Freeman, Mary Joe Frug, and Margaret A. Baldwin, all published in D. Kelly Weisberg, ed., APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION (Temple University Press, 1996) 187-261.

[18]For a positive view on this law, *see* Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187 (2004).

[19]SOUTH CHINA MORNING POST, May 26, 1999, p. 3.

Mainland Chinese women who are apprehended by immigration officials on suspicion of sex work are sometimes simply returned to China (with the understanding that they will be banned from visiting Hong Kong for a period of time). However, large numbers of women are apprehended by police officers in "sting" operations, after which they are prosecuted, convicted, and incarcerated. In 2005, almost 12,000 women from Mainland China were admitted to Hong Kong prisons, representing about three-quarters of the female prison population. Although the percentage has dropped somewhat in the past few years, the Hong Kong government recently told the UN Committee Against Torture that it incarcerated approximately 9,400 Mainland Chinese women in 2007, representing about half of Hong Kong's female prison population.[20]

We interviewed 75 of these women through an interpreter and obtained 58 valid interviews. Their stories revealed that the majority of these women are poor, have little formal education, and were ill informed regarding Hong Kong law. Many had been recruited by people who promised them other types of jobs or who told them that sex work was legal in Hong Kong (which is not the case for migrant women). Their stories also documented a highly standardized criminal justice system, one that is designed to convict migrant sex workers as quickly and efficiently as possible. We confirmed these findings by conducting court observations, which showed that women are often tried in groups and that it takes an average of about 3 minutes to convict a migrant woman accused of engaging in sex work. Our first article from the study questioned the policy reasons for incarcerating such a large number of women, at an estimated annual cost of about 20 million US dollars.[21] Although we found a few sympathetic magistrates (who told us, off the record, that they would prefer to give these women suspended sentences), the government officials apparently believe that harsh punishment is the only effective way to deter women from entering Hong Kong for the purposes of sex work.

The second article from our study examined whether Hong Kong police, immigration officials, and judges take adequate steps to identify potential victims of trafficking.[22] We had noted that the Hong Kong government only rarely identifies a woman as a victim of sex trafficking. Given the huge increase in the number of Mainland Chinese women coming to Hong Kong for sex work (many of them very young and working under third-party management), we were surprised to find no corresponding increase in the number of women identified as victims of trafficking. From 2000-2006,

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[20]Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Hong Kong to the Committee Against Torture (CAT/C/HKG/4), Sept. 26, 2008, paras 108-109.

[21]*See* Karen Joe Laidler, Carole J. Petersen, and Robyn Emerton, *Bureaucratic Justice: The Incarceration of Mainland Chinese Women Working in Hong Kong's Sex Industry*, 51 (1) INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 52 (2007).

[22]*See* Robyn Emerton, Karen Joe Laidler, and Carole J. Petersen, *Trafficking of Mainland Chinese Women Into Hong Kong's Sex Industry: Problems of Identification and Response*, 2 ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW 35 (2007).

48,026 migrant women were arrested in Hong Kong for suspected involvement in prostitution but only 36 (0.07%) had been identified as victims of trafficking. This seemed remarkably low to us.

Based upon our interviewees' accounts, 12 of the 58 women in our study (21%) should have been considered "victims of trafficking" under the international definition of the term. Yet none of these 12 women had been identified as such by the Hong Kong authorities. We concluded that this is partly because Hong Kong does not have a legal definition of "trafficking victim" but also because the criminal justice system moves with lightening speed and encourages women to plead guilty, so as to obtain a lighter sentence. As a result, women have little opportunity to tell their stories and are actively discouraged from doing so. Our study cast doubt on the standards and methodology that the US Department of State uses in its annual *Trafficking in Persons Report,* which has consistently placed Hong Kong in "tier 1" on the grounds that it implements strong anti-trafficking measures and assists and protects trafficking victims.

The women who we classified as victims of trafficking had generally been lured to Hong Kong by false promises of jobs outside the sex industry. Some were incredibly naïve and thought that they were working with a legitimate visa, which they willingly showed to the police or immigration officials when apprehended. One of our interviewees was only 15, which is below the age of consent for sexual intercourse in Hong Kong. Some reported harrowing stories of being locked up in apartments on their arrival in Hong Kong and threatened if they did not agree to do sex work. However, from the point of view of the police and many government officials, our interviewees were not victims of violence or coercion but rather willing violators of immigration law. In discussing our research results, it became clear that many Hong Kong officials (and perhaps the general public) had little sympathy for these women. It was often pointed out to me that the punishment these women receive is not a condemnation of the *nature* of their work, but rather punishment for their intentional violation of immigration law. This has also been put forth as a justification for counseling young defendants to plead guilty: telling the judge that they intended to be a dishwasher rather than a sex worker would not constitute a defense to the charge of "breach of condition of stay" because any form of work would violate immigration law. And once that "guilt" is established, their experiences of violence became fairly irrelevant. Some interviewees even claimed that they were ignored when they tried to tell police about a friend or relative who was still being held by a brothel manager.

This community response to our research has led me to look more closely at the treatment of Hong Kong's local sex workers, to investigate whether violence against them is perceived any differently. In theory, local Hong Kong women do have a right to engage in sex work and so one might assume that they would be in a better position than migrant sex workers. However, the profession is regulated so tightly that almost everything related to sex work is prohibited, including: soliciting for an immoral purpose;[23] putting up public signs advertising prostitution;[24] and running a vice

[23]Crimes Ordinance, Laws of Hong Kong, Chapter 200, s. 147.

establishment.[25] The term "vice establishment" is interpreted broadly, so as to include the use of premises "wholly or mainly" by two or more persons for the purpose of prostitution.[26] This means that if two women share an apartment for sex work, they can be convicted of running a vice establishment, which makes them liable for imprisonment of up to ten years. A sex worker also may not employ a security guard or other assistant because that person would be guilty of the offense of "knowingly liv[ing] wholly or in part on the earnings of prostitution of another". [27] Thus, sex work is only legal in Hong Kong if it is conducted in a one-woman brothel and if the sex worker is careful not to solicit or advertise in public.

Local sex worker organizations and advocacy groups have argued, for many years, that these extensive criminal offences make sex workers more vulnerable to violence by (1) giving police an excuse to harass sex workers through undercover operations, which can lead directly to arrest, intrusive body searches, and other abuse; and (2) compelling women to work alone and without protection, in some cases leading to violent attacks and even murder. The remainder of this section of the paper provides a few examples of how the legal restrictions expose sex workers to violence and the strategies that sex workers and their supporters have adopted to lobby for law reform.

One of the primary complaints of local sex workers in Hong Kong is that police adopt elaborate undercover operations, in which officers receive sexual services from women in order to gain evidence against them. About four years ago, one particularly active sex worker group, Zi Teng, went public with its complaint that undercover agents were entrapping sex workers and receiving free sexual services in the process. Their members felt particularly enraged that undercover officers were receiving services under false pretences, then "zipping up" and promptly making an arrest. Zi Teng also claimed that sex workers were being subjected to humiliating body searches and threatened by police once they were taken to the station, in an effort to persuade them to simply confess to illegal acts and save the police the trouble of a prosecution (an allegation that has been denied by the Hong Kong government).

Although a little embarrassed by the public disclosure that its undercover agents were obtaining free sexual services, the Hong Kong government did not put an end to it. Rather it defended the practice, insisting that police officers were only receiving masturbation services (not intercourse or oral sex) and that this service was sometimes necessary in order for the police to obtain evidence. After all, the government argued, how can we obtain evidence that premises are being used as a "vice establishment" unless the officer can testify that he received sexual services there? Not satisfied by this response, Zi Teng sought legal advice from Simon Young, a law professor at the University of Hong Kong who also has prosecutorial experience in Canada. Young produced a detailed written opinion stating that the practice of receiving sexual services

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[24] *Ibid,* s. 147A.
[25] *Ibid,* s. 139.
[26] *Ibid,* s. 117 (3).
[27] *Ibid,* s. 137.

was unlikely to be necessary except in rare circumstances (e.g. if an officer risked losing his cover and being injured if he declined services) and that many other jurisdictions did not allow it. He also argued that there were serious ethical and legal reasons why the police should not pursue this as a strategy. For example, the agent might run the risk of having a sexual encounter with someone below the age of consent.

Although the Hong Kong government has not backed down from its position on undercover operations, it appears that Zi Teng's complaints and Professor Young's legal opinion have had at least some limited impact. The Legislative Council's Security Panel took an interest in the complaint and asked the government to provide information on the number of times that sexual services were being received. The government only recently started to provide this information (in late 2008) but it appears that the occasions are now fairly rare. The government reported that the police had revised their internal guidelines on anti-vice operations and that officers at the rank of Deputy District Commander or Senior Superintendent are now given a more "active role" in supervising undercover operations, with more "vigorous control" over the scope and extent of the evidence to be gathered, including the extent of body contact with sex workers. As these guidelines were only adopted in 2007, they were almost certainly inspired by Zi Teng's complaint and Professor Young's legal opinion of 2006.[28] The government also assured legislators that the revised guidelines would "reinforce" the principle that undercover officers are not allowed to receive oral sex or sexual intercourse from sex workers, a principle that was often breached according to sex workers. The government has also recently released new guidelines on searching sex workers and other people held in detention. The humiliating strip searches and "body cavity" searches are still occurring but are hopefully being conducted with more sensitivity and care than in the past. [29]

However, guidelines are not the same as law reform and they fall well short of what Zi Teng and its supporting organizations, such as Action for Reach Out, have been seeking. The police and correctional service officers still have enormous discretion in deciding how to treat sex workers. Sex worker groups are therefore lobbying for full (or at least greater) legalization of sex work, which would give the police fewer excuses to entrap, detain, search, and prosecute sex workers.

In additional to less violence at the hands of the police, sex workers argue that legalization would give them more power to defend themselves against criminals and violent customers. Under the present legal framework, the only way that a sex worker can avoid breaking the law (and being harassed by the police) is by working entirely alone in

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[28]Letter from Security Bureau to Raymond Lam, Clerk to the Legislative Council's Panel on Security, Dec. 8, 2008, LC Paper No. CB(2)417/08-09(02) available at: http://www.legco.gov.hk/yr0809/english/panels/se/se_phsw/papers/se_phsw1209cb2-417-2-e.pdf (visited Oct. 20, 2009).

[29]Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Hong Kong to the Committee Against Torture (CAT/C/HKG/4), Sept. 26, 2008, paras 124-128.

her own apartment. Naturally, this makes a woman highly vulnerable to violent attack. This argument gained strength in the past year because a man was convicted (in July 2009) of three consecutive murders of sex workers, all in one-woman brothels. Another defendant was convicted of murdering a young girl engaged in "compensated dating", a recent phenomena that is generating substantial public debate in Hong Kong. These trials attracted significant public attention and sex worker organizations intensified their campaigns, attracting some support in the Hong Kong legislature and in the press. Action for Reach Out has established an on-line petition to gain support for removing the ban on two-women brothels (which can be signed at: http://www.afro.org.hk/EN/). But the government continues to oppose any substantive law reform, maintaining that the "one-woman brothel" policy is a reasonable compromise between those who would prefer absolute prohibition of prostitution and those who seek full legalization. Meanwhile, sex workers who decide to violate the law by working together (or by hiring a security card) risk being targeted in undercover operations.

In this particular area, it appears that the interest of international human rights bodies has had relatively little impact. In 2008, the Committee Against Torture asked the Hong Kong government to supplement its report by commenting on sex worker complaints of "treatment received during both undercover operations and in investigations and interrogations, including allegations of unnecessary and intrusive strip searches and the reported receiving of free sexual services by the police".[30] The Hong Kong government did respond at length, primarily by describing the "safeguards" that are in place to prevent abuse by the police. But did not give much ground on the fundamental point of dispute, insisting that there is an "operational need for the police to conduct covert operations in order to collect the necessary evidence for charging vice-operators."[31] It also assured the Committee that any person aggrieved by a police action, including anti-vice operations and body searches, is free to lodge complaints. The police apparently did not bother to keep statistics of complaints statistics until January 2007. By May 2008, 34 formal complaints had been received from sex workers or sex worker associations but the government's position, before the Committee Against Torture, was that none of the complaints had been substantiated.[32]

It is clear from the press coverage and discussions in the legislature that there has been an active debate in the past four years on how to prevent violence against women working in the sex industry. But it is also clear that even minor changes to the law (such as a allowing several sex workers to work together or to hire a security guard) would probably be opposed by the government. The government probably realizes that the current legal framework is problematic but also knows that any law reform proposal (whether toward legalization or abolition) would generate substantial opposition. Those who oppose sex work would strongly oppose giving the industry any more "legal space" while those who purchase sex (or believe that women should be entitled to sell it) want to keep it at least marginally legal. The majority may prefer to live with the existing legal compromise rather

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[30] *Ibid.* Question 27.
[31] *Ibid.* para 133.
[32] *Ibid.* para 139.

than commencing a law reform exercise that could lead to an outcome they do not support. Meanwhile, the sex workers remain in legal limbo, an unacceptably dangerous position.

IV. Migrant domestic workers in Hong Kong

The Hong Kong government refers to migrant domestic workers rather pejoratively as "foreign domestic helpers". On the surface these women would appear to have little in common with sex workers. They are completely "legal" and come to Hong Kong as part of a government-approved program, with a standard contract that purports to value their work and protect their rights. Although employed in Hong Kong since the mid-1970s, it was in the mid-1980s that they began to play a really important role in Hong Kong's economy. They grew from 1% of Hong Kong's labor force in 1982 to 7% in 2001. By 2005 more than 222,500 migrant domestic workers were working in Hong Kong. The Philippines has traditionally been the main country of origin but that is gradually changing, with an increasing number of women coming from Indonesia. In 2005, approximately 118,400 (53%) came from the Philippines and 95,700 (43%) came from Indonesia.[33]

In theory, migrant domestic workers are free to file complaints against their employers and some abusive employers have been prosecuted. In practice, however, it is extremely difficult to purse a complaint and the legal remedies are rarely effective. In order to understand how this occurs, it is necessary to understand the relationship between immigration law and labor law in Hong Kong. The "foreign domestic helper" program is administered jointly by the Immigration Department and the Labour Department. The Immigration Ordinance sets forth the conditions of stay and excludes migrant domestic workers from ever acquiring the "right of abode" (similar to permanent residence) in Hong Kong. The Immigration Department issues the work visa but only after the prospective employer and employee have entered into the standard form contract.[34] Under that contract, a migrant domestic worker is obligated to live with her employer[35] and to work up to six days per week, with no maximum number of daily

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[33]For population trends and a general background on the migrant domestic worker program in Hong Kong, *see* Peggy Lee and Carole J. Petersen, *Forced Labour and Dept Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*, Centre for Comparative and Public Law Occasional Paper No. 11, June 2006 (available at http://www.hku.hk/ccpl/).

[34]Hong Kong Government, Immigration Department, *Guidebook for Employment of Domestic Helpers from Abroad* available at: http://www.immd.gov.hk/ehtml/hkvisas_5.5.htm (visited Oct 15, 2009). For a specimen of the standard contract *see*: http://www.immd.gov.hk/ehtml/id407form.htm (visited Oct 15, 2009).

[35]Contracts processed after April 1, 2003 require newly hired migrant domestic workers to live with their employers, in order to prevent migrant workers from competing with local workers for "live-out" domestic positions. *See* Hong Kong Legislative Council, *Paper on Policy Government Employment of Foreign Domestic Helpers* (July 5, 2005)

working hours. Th e contract specifies a minimum wage and requires employers to provide food or a food allowance, reasonable accommodation with a specified minimum amount of space and privacy, free medical care, and one rest day each week. The contract provides that the employee shall perform *only* domestic work in her employer's household. This is partly to protect the employee (as some employers will try to subcontract domestic workers to other households or to retail shops). However, it is also designed to prevent migrant domestic workers from competing for jobs with local workers.

The majority of migrant domestic workers in Hong Kong are initially recruited and placed with an employer by an employment agency. Hong Kong employment agencies are regulated by the section 57 of the Employment Ordinance and by Employment Agency Regulations. The employment agency may lawfully charge a worker a commission (a placement fee) of no more than ten percent of her first month's salary.[36] However, migrant domestic workers have frequently complained that they are charged illegal placement fees, sometimes in their home country and sometimes after they have arrived in Hong Kong.

The Labour Department administers Hong Kong employment law and regulations. Both local and migrant workers are covered by local labour law, including the Employment Ordinance, and the Employee's Compensation Ordinance. The Labour Department has issued a *Practical Guide*[37] to advise employers and migrant domestic workers on their rights and duties. The Labour Relations Division provides voluntary conciliation services for disputes relating to wages and other conditions of employment. The Employment Claims Investigation Division investigates suspected offences and can initiate prosecutions.[38] Underpayment is a considered a serious offense, as explained by the Labour Department:

> Approval for the importation of [a] foreign domestic helper is based on facts submitted to the Director of Immigration, whereby the employer has agreed to pay not less than the minimum allowable wage. An employer who underpays wages as stated in the standard employment contract is liable, upon conviction, to a maximum fine of HK$350,000 and three years' imprisonment. The employer would also be committing serious offences of making false representation to an

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available at: http://www.legco.gov.hk/yr04-05/english/panels/se/papers/se0705cb2-2116-7e.pdf (visited Oct 15, 2009).

[36]Employment Agency Regulations, Cap. 57A, Laws of Hong Kong (1974) Regulation 10 (which refers to Part II of Schedule 2).

[37]*See* Hong Kong Government, Department of Labour, *Practical Guide for Employment of Foreign Domestic Helpers - What foreign domestic helpers and their employers should know*, available at: http://www.labour.gov.hk/eng/plan/iwFDH.htm (visited Oct 15, 2009).

[38]For further information on the structure and powers of the Labour Department and its divisions *see* http://www.labour.gov.hk/eng/labour/content.htm (visited Oct 15, 2009).

Immigration Officer and conspiracy to defraud. Any person convicted of the offence of conspiracy to defraud is liable to imprisonment for 14 years.[39]

The law also prohibits an employer from making a deduction from a worker's salary to pay an excessive fees demanded by employment agencies. An employer may only make salary deductions in certain limited circumstances, such as where the employee received an advance of wages.[40]

In practice, however, the legal and policy framework discourages migrant domestic workers from filing complaints, allowing corrupt employment agencies and employers to violate the law with little fear of prosecution. First, migrant domestic workers are not permitted to switch employers before the end of the two-year contract (except in unusual circumstances, such as when the employer leaves Hong Kong). This policy is designed to prevent what government officials sometimes refer to as "job hopping" by migrant domestic workers. (Of course, a local Hong Kong worker has a legal right to "hop" to a new job whenever she can locate a better position.) Second, the Hong Kong government enforces the policy by maintaining an immigration rule known as the "two-week rule", which states that migrant domestic workers may only remain in Hong Kong for the remainder of their "limit of stay" or for two weeks, whichever is shorter. The two-week rule replaced an earlier practice of granting six-month renewable work visas to migrant domestic workers and allowing them to change employers in the second year of the contract if the employer would grant a release letter.[41] Under the current policy, if a woman or her employer terminates the two-year contract early then she is required to return to her home country within two weeks.[42] This gives the employer the power to terminate not only the employment relationship but also the work visa and naturally discourages workers from filing complaints about their employers.

Despite the severe consequences, a certain number of migrant women do leave their employers and file complaints of underpayment of wages, denial of rest days, or physical or sexual abuse. In 2005-2006, my research assistant interviewed 22 of these women, all of whom were residing temporarily in shelters and seeking remedies from their former employers.[43] We also interviewed additional individuals (lawyers and social workers) who had assisted migrant domestic workers with their claims. We drew the

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[39] Labour Department, *Practical Guide,* n 37 above, p. 7.

[40] *Ibid,* p. 8.

[41] For a summary of the policy before 1987 *see* Andrew Hicks, *Admission of Foreign Domestic Helpers: Some Legal Issues,* (1983) 13 HONG KONG LAW JOURNAL 194.

[42]There are four possible exceptions to the "two-week rule", which can be granted at the discretion of the Director of Immigration: (1) death of employer; 92) financial difficulty of the employer; (3) employer has left Hong Kong; and (4) proven maltreatment.

[43]The interviews were conducted by Ms. Peggy Lee, Senior Research Assistant at the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong. Funding for the project was provided by an anonymous donation to our Equality and Law Project, which was based in the Centre.

following conclusions from the interviews, which we subsequently circulated to the Hong Kong government and interested parties:

(1) Our interviewees were consistently deceived about their legal rights by employment agencies and were not given a copy of the standard form employment contract that they had been required to sign.

(2) All of our interviewees had been compelled to pay placement fees ranging from HK$6,000-$21,000, well beyond the legal maximum. (The exchange rate is roughly 7.5 HK dollars to one US dollar.)

(3) Certain employment agencies were routinely using finance companies to disguise the placement fees as loans. The workers were then required to pay the fees through debt bondage arrangements, with employers being directed to send most of the monthly salary to a finance company or an agent.

(4) Many of our interviewees reported that their employers paid less than the required minimum wage even before the illegal deductions; thus a migrant domestic worker could be left with little or no salary for three to seven months.

(5) Passports and identity documents were routinely confiscated by certain agencies and employers, denying the worker freedom of movement and making her vulnerable to prosecution (as Hong Kong law requires persons to carry identity documents).

(6) Our interviewees were often denied their full rest day (for example, they might be required to clean a relative's apartment on Sunday or to clean the family kitchen when they returned on Sunday evening).

(7) Interviewees often were not provided with adequate accommodation; for example they were required to sleep on the floor or on a sofa in the living room, which violates the standard form contract.

(8) Interviewees reported frequent threats of or actual physical abuse during their employment.

(9) Many of interviewees told us that they did not leave their employers until the situation became unbearable, either because they did not realize they had legal rights or because they dreaded being returned to their home countries with no financial profit.

(10) The interviewees from Indonesia felt particularly vulnerable, partly because they are generally less fluent in English than Filipino workers and thus had a more difficult time ascertaining their rights and communicating with authorities. The Indonesian workers were also required, by their own government, to be placed by an employment agency (whereas Filipino domestic workers could be directly

hired by employers, which is common after they have completed an initial two-year contract). In theory the Indonesian government's policy was intended to protect migrant workers. However, based upon my informal follow-up interviews with Indonesian migrant worker organizations, there is a strongly held suspicion that the policy was developed to benefit corrupt employment agencies.

When we publicized the preliminary results of our research, various branches of the Hong Kong government immediately rejected our interviews as "unrepresentative". The interviews probably are not representative of all migrant domestic workers in Hong Kong as our interview pool consisted of women who had fled their employers and thus were in particularly bad situations. But the stories were very similar and demonstrated a pattern of operation that was clearly being followed by at least some corrupt employment agencies. Even if only a small percentage of women were living in situations of debt bondage, one would expect this to raise some alarm bells among government officials.

Some of our interviewees also gave us documents that clearly directed employers to deduct money from a woman's salary and send it directly to the employment agency to pay off the alleged "debt" -- which was really just an illegal placement fee. When I mentioned this piece of evidence in an off-the-record conversation with an official from the Hong Kong government he pointed out that we had no idea how the woman got into debt. It was her word that the "debt" was for an illegal placement fee; the employment agency would claim that she received training or cash in her home country and thus had come to Hong Kong with a debt to be paid off. Hong Kong officials like to refer to this as a "home grown" problem, meaning that it has nothing to do with Hong Kong laws or policies. The fact that these women were trapped in situations of debt bondage in Hong Kong and that their salaries were being diverted to a Hong Kong finance company did not seem to worry the official.

If a migrant domestic worker does make the difficult decision to file a complaint she generally will have to negotiate with her former employer for any remedy. This is because the primary mechanism for resolving labor disputes in Hong Kong is voluntary conciliation at the Labour Department's Labour Relations Division, a model that gives considerable bargaining power to the employer. The two-week rule makes this relationship even more unbalanced. The Immigration Department will extend a migrant worker's visa if she has an active claim with the Labour Department but it normally grants only short extensions, compelling the worker to pay repeated visa fees if the dispute is not resolved quickly. This causes severe hardship, especially as the government normally does not allow the woman to accept any paid employment while she pursues her claim. There is a strong incentive for the worker to accept any offer from the employer, even if it is significantly less than her legal entitlement.

Similar problems arise if a worker files a complaint with the Hong Kong Equal Opportunities Commission (EOC) for employment discrimination or sexual harassment. In theory, migrant domestic workers have the same rights as local workers under the Disability Discrimination Ordinance (DDO), the Sex Discrimination Ordinance (SDO), and the Race Discrimination Ordinance (RDO). In fact, a special provision in the SDO

prohibits anyone who lives in the household where a migrant works from sexually harassing her.[44] This was included because the legislature recognized that a live-in domestic worker might be harassed by people other than the employer (for example, the husband or son of the employer). However, if a woman files a complaint against the employer or a member of the employer's family this will certainly result in termination of the contract, leaving the woman without a work visa and unable to support herself while the claim is being investigated at the EOC. Like the Labour Department, the EOC depends primarily upon voluntary conciliation to resolve complaints and this gives the respondent a superior bargaining position.[45] An employer of a migrant worker has a particularly strong incentive to drag out the process (or to refuse to conciliate), hoping that the migrant may give up and simply return home.

Thus, although migrant domestic workers theoretically enjoy many of the same legal protections as local workers, in practice they will find it far more difficult to enforce their rights. At one stage, I was hopeful that the government would amend the two-week rule when provided with clear evidence of abuse. I even entertained hopes that the government would find a way to take the corrupt employment agencies out of the equation all together, perhaps by establishing a government-managed recruitment service in certain sending countries. But the response by the government and its departments has not been encouraging. One positive step that has been taken is that the government has produced far more literature (and in more languages) on the rights of migrant domestic workers. It has also prosecuted a few particularly abusive employers (one of whom deliberately placed a hot iron on her domestic worker's hand). But the primary governmental response has been to just repeat the stock phrase that migrant domestic workers enjoy all the same labor rights and remedies as local workers, ignoring the evidence that immigration rules make these rights illusory. Some women are lucky enough to find a lawyer or other advocate who is willing to work for them on a pro-bono basis but most seem to carry the burden on their own or have limited assistance from fellow migrant workers. All are compelled to live on charity while pursuing their claims.

Parts of our research report have been used by migrant worker organizations in shadow reports to UN human rights treaty bodies. The CEDAW Committee issued very specific comments in its 2006 Concluding Observations on Hong Kong, asking that the government repeal the two-week rule and make it easier for workers to remain in Hong Kong while seeking redress for contractual violations. Similar recommendations have

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[44]Sex Discrimination Ordinance, Cap. 480, Laws of Hong Kong, s. 23. For discussion of the sexual harassment provisions and their enforcement, *see* Carole J. Petersen, *Negotiating Respect: Sexual Harassment and the Law in Hong Kong*, (2005) 7 INTERNATIONAL JOURNAL OF DISCRIMINATION AND THE LAW 127-168.

[45]*See* Carole J. Petersen, Janice Fong, and Gabrielle Rush, ENFORCING EQUAL OPPORTUNITIES: INVESTIGATION AND CONCILIATION OF DISCRIMINATION COMPLAINTS IN HONG KONG (Centre for Comparative and Public Law, University of Hong Kong, 2003), especially ch. 6; *and* Carole J. Petersen, *Investigation and Conciliation of Employment Discrimination Claims in the Context of Hong Kong*, (2001) 5 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 627-659.

been made by the Committee on Economic, Social and Cultural Rights. The most recent criticisms were issued in August 2009, by the Committee on the Elimination of Racial Discrimination. It noted:

> [T]he Committee reiterates its concern . . . at the situation of migrant workers, and in particular domestic migrant workers. It notes with concern that the "two-weeks rule" (whereby domestic migrant workers have to leave Hong Kong within two weeks upon termination of contract) continues to be in force, as well as the live-in requirement, and that migrant workers may be subject to longer working hours, and shorter rest and holiday periods.
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> The Committee recommends that effective measures be taken to ensure that domestic migrant workers are not discriminated against. It calls upon [sic] repealing of the "two-weeks rule" as well as the live-in requirement and that the State party adopt a more flexible approach to domestic migrant workers in relation to their working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.[46]

Nonetheless, the Hong Kong government has maintained a very resolute position and staunchly defends the two-week rule, although it does not have the status of a law and could be amended with little procedural difficulty.

Given that the government does care about its international reputation, why would it be so unwilling to undertake a policy reform to protect this large group of women from corruption, debt bondage, and abuse? The government's attitude is particularly baffling in that migrant domestic workers are entirely "legal" and come to Hong Kong as part of a government-sponsored program. They are also considered essential employees by many households because parents work long hours in Hong Kong and there is very little public childcare. Thus the government's lack of concern for migrant domestic workers is probably not based on any moral "disapproval" (which may account, at least in part, for the disregard for sex workers' safety).

But migrant domestic workers do have one thing in common with sex workers: they are also balanced on top of an awkward political compromise, this time one with serious economic consequences. In the past 15 years there has been rising unemployment among middle-aged women in Hong Kong, largely because so many factories have relocated to Mainland China. As a result, there is increased tension between those families who want to hire a migrant domestic worker and those who view them as taking jobs away from local women. This is one of the main reasons that the government instituted a "live-in" requirement, whereas previously employers had the option of providing their migrant domestic helper a stipend to rent space in a separate apartment. Migrant women often

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[46]Concluding Observations of the Committee on the Elimination of Racial Discrimination on the People's Republic of China (including Hong Kong and Macau Special Administrative Regions), Aug. 28, 2009, para 30.

preferred this arrangement as it gave them more independence and space from their employers. It also greatly reduced the chance of sexual harassment as the worker was not obligated to bathe and sleep in the employer's home. But, by requiring migrant domestic helpers to live with their employers, the government helps to ensure that local domestic helpers (who also generally prefer to live with their own families) have no foreign competition in that particular market.

If the government were to empower the migrant domestic workers by relaxing any of the restrictions on them (e.g. the two-week rule or the live-in requirement) then it would very likely attract criticism from some local labor groups. It must also be acknowledged that families who employ migrant domestic workers have little incentive to strengthen the bargaining position of their employees. Although they may not wish to admit it, many employers are probably quite happy to have the two-week rule in place.

V. Conclusions

It is not just the "private nature" of their work that makes sex workers and migrant domestic workers particularly vulnerable to violence. The Hong Kong legal system pushes them into situations of heightened danger, denying them the agency that all women deserve in their workplaces and homes. The government's reluctance to make even small changes to these laws and policies (in an era of substantial law reform in Hong Kong) indicates that multiple forms of discrimination are operating here. However, the treatment of these women probably cannot be explained as simply the product of prejudice. The fact that the government recently proposed to extend the Domestic Violence Ordinance to include same-sex couples (although it has long opposed same-sex marriage and has been taken to court more than once for sexuality discrimination) indicates that the government is can move beyond prejudices when it comes to safety issues. For some reason, however, the safety of sex workers and migrant domestic workers has not yet risen to the top of the agenda.